(31)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 410.

LOUIS H. EGAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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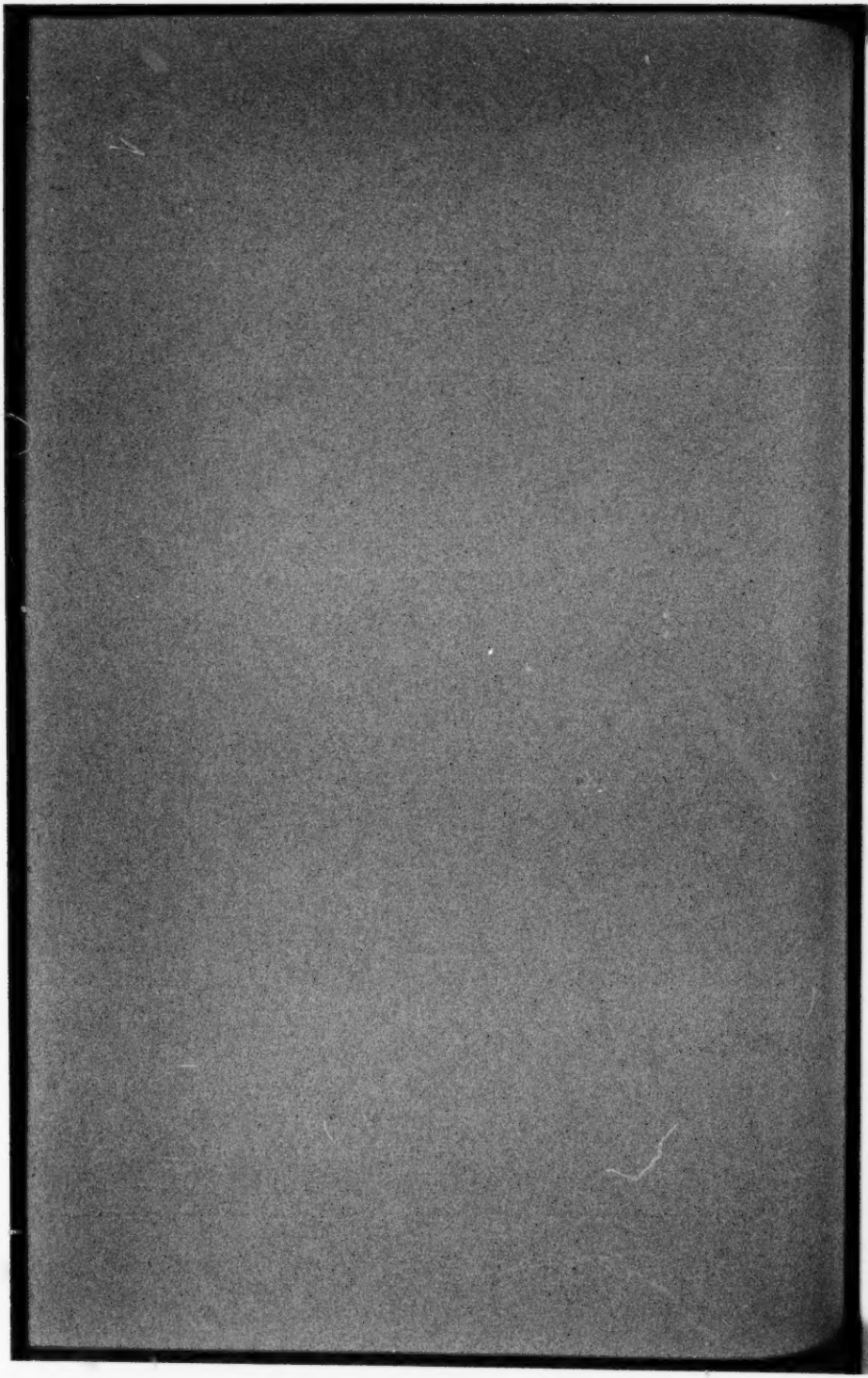

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I.

Constitutional Questions.

The brief in opposition concedes that the constitutional question is important (Gov. Brief 14), and that it is here raised for the first time (Gov. Brief 19). It does not deny that this issue is of sufficient general importance to warrant certiorari. It takes issue with the petitioner on the

merits of the question, contending that Section 12-H is a valid exercise of the commerce power. We say it is not, and we find in the brief in opposition no satisfactory answer to our attack on the validity of this section.

1) The brief in opposition says first that the objection that the Act includes companies not engaged in interstate commerce is not available to petitioner because Union Electric Company is engaged in interstate commerce (Gov. Brief 14, 15). This Court, however, has in similar situations repeatedly held otherwise (U. S. v. Reese et al., 92 U. S. 214, syl. 4 and 5, l. c. 220-222; James v. Bowman, 190 U. S. 127, l. c. 140-142; Employers' Liability Cases, 207 U. S. 463, l. c. 496-502). These cases all rule that where a criminal statute is in general language broad enough to cover acts without as well as within the Congressional power, it is invalid in its entirety, except where parts of it can be saved under the doctrine of separability. As said in the Reese case (l. c. 221):

> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

In the Employers' Liability cases the language of the act was broad enough to include liabilities not arising in interstate commerce, and the act, not being separable, was held to be invalid. So, in this case, Section 12-H includes any registered holding company or subsidiary irrespective of whether or not it is engaged in interstate commerce. As pointed out in our petition, the inclusion of companies not engaged in interstate commerce is beyond the power of Congress under the commerce clause, and invalidates the section.

2) While conceding that the Act contains no express finding that the intrastate contributions to candidates at state and sub-state elections affect interstate commerce, the brief in opposition argues that "the pattern of the regulation," as set out in Section 1 of the Act, constitutes such a finding (Gov. Brief 15). In support of this argument the brief in opposition points to Section 1 (b) 5, concerning lack of economy in management and lack of effective public regulation. The obvious lack of relationship between these abuses and political contributions might well be debated. A more fundamental answer, however, is the fact that, if any such relationship could be inferred, it would not follow that Congress had made any finding that the prohibitions of Section 12-H affect interstate commerce. The Congressional findings, in respect to interstate commerce, are contained in Sub-section A of Section 1 of the Act, and are enumerated under five heads, and these findings do not include political contributions. The recitals in Sub-section B of Section 1 of abuses detrimental to the public interest evidence merely the motives and purposes which caused Congress to enact the legislation, not the facts upon which Congress based its power to so enact. These latter facts are found in Sub-section A of Section 1. They are the facts upon which Congress based its jurisdiction under the commerce power, and they do not include intrastate political practices prohibited by Section 12-H, nor anything having any relation to such practices. We say, therefore, that the argument in opposition on this point is wholly without merit.

3) Finally, the brief in opposition seeks to sustain the Act as "in aid of the domestic policies of the states" (Gov. Brief 17), the argument being that because sub-section B of Section 6, and sub-section B of Section 9, exempt certain security issues and the acquisition of certain assets from the provisions of Sections 7 and 10, respectively, when

approved by state commissions, that, therefore, Congress may legislate as to any matter that may affect the independence and integrity of state governments. We submit the mere statement of such a proposition is sufficient to refute it. None of the cases cited (Gov. Brief 19) support any such theory of federal power.

II.

Statement.

We cannot accept the Government's statement as fairly reflecting the evidence on the issue of Egan's alleged participation. The Government's own witnesses exonerated Egan from any participation in the accumulation or disbursement of the funds, or the contributions to candidates—see testimony of Laun (R. 690-1-2); Spoehrer (R. 432, 486); Miltenberger (R. 304, 466); Irish (R. 505); Emberson (R. 476); Avery (R. 460); Boehm (R. 895, 843, 893); Hamilton (R. 324); Alschuler (R. 360); and Fowler (R. 312).

The following, from Laun's cross-examination, is typical of the testimony of all these witnesses (R. 690):

> "I started padding my expense account along about 1933 or 1934, because Mr. Boehm, my superior officer, instructed me to do so. I never received any instructions from Mr. Louis Egan to pad my expense account, and never during the years from 1934 to 1938, and to the end, reported to Mr. Louis Egan that I was doing so. All the money thus accrued was delivered by my secretary to Mr. Boehm. None of it went, directly or indirectly, to Mr. Egan.
>
> "The transactions I had with Fowler, Hamilton, Alschuler and McMillan were made at Mr. Boehm's direction. The refunds back from them to Boehm were made at Boehm's direction. I never received any instruction from Louis Egan to get refunds from any of those attorneys, and had no occasion to report to Mr. Egan that I was doing so.

"The distribution of funds I made to politicians was done at the direction of Frank Boehm. In each instance I went to his office to get the money. I never received any instructions from Mr. Egan to make those contributions, and had no occasion to report to Mr. Egan that I was doing so."

The circumstantial evidence relied on to prove participation was all either incompetent or consistent with innocence.

The arrangement for the Union Colliery salary (R. 1116-7) was too remote in point of time to prove connection with the conspiracy (Crowley v. U. S., 8 Fed. [2d] 118, 9th Cir., Syl. 1, l. c. 119; Clark v. U. S., 61 Fed. [2d] 409, 5th Cir., Syl. 4).

In 1926, when the above arrangement was made, there was no plan then existing for political contributions, nor any public utility act—22 C. J. S., Crim. Law, Sec. 764, note 11. Further, the salary was discontinued December 31, 1937 (R. 851, 1038, 1117, 619), and the Government's own evidence shows that no contribution was made by Egan after the Act became applicable to Union Electric, and while he was receiving a salary from Union Colliery Company.

The North American Company registered February 25, 1937 (R. 213); therefore, the 1936 contributions were prior to the Act becoming applicable to Union Electric. The 1938 contribution was made after the salary had ceased (R. 851, 1038, 1117, 619), and it is only when transactions are continued after the law prohibiting them takes effect that acts or conduct prior thereto are admissible (Nyquist v. U. S., 2 Fed. [2d], 6th Cir., 504; Bailey v. U. S., 5 Fed. [2d], 5th Cir., 437, l. c. 438, par. 1 and 2).

There was not a shred of evidence that Egan had any knowledge of or part in the arrangement between Boehm and Keller whereby the discount on the insulators was returned to Boehm in cash (R. 285, 286, 304, 305, 1111). Likewise, there was no evidence whatever as to why or

for what purpose Boehm claims to have sent Egan $4,500 (R. 805, 1161), nor any evidence that Egan had any knowledge of the source of these funds. Those alleged payments are wholly unexplained, and we submit that the bare fact that Egan may have received this money is entirely consistent with innocence (Linde v. U. S., 13 Fed. [2d] [8th Cir.] 59, l. c. 61; Dickerson v. U. S., 18 Fed. [2d] 887, 8th Cir., l. c. 893; McLaughlin v. U. S., 26 Fed. [2d] 1, l. c. 3, pars. 5, 6).

There were two meetings of Missouri utilities at Bagnell Dam in 1934. There is some question whether Egan was present at the one at which Boehm unfolded his plan for political contributions (R. 777, 779, 1112). All Government witnesses present at the meeting, however, testified that nobody agreed with Boehm and no plan was entered into (R. 675, 770, 771, 773).

The interest which Egan took in public relations and public ownership movements and proposed legislation affecting the interest of the utility was all open and aboveboard. He told the SEC about it (R. 763), and described it in his own testimony (R. 1112, 1113). There is no evidence that he had any part whatever in the undercover work of Boehm and Laun.

The testimony referred to by the Government, to the effect that during the SEC investigation, after the alleged conspiracy was over, Egan spoke a word of advice or encouragement to old employes under investigation tends to prove no more than knowledge or the means of knowledge. There is not a word or deed attributed to Egan in any of these conversations that can be said to be an act in furtherance of, or participation in, the alleged conspiracy. In short, there is to be found in this record no substantial evidence that Egan, either by word or deed, ever actively participated in these unlawful activities which went on under Boehm's direction (Turcott v. U. S., 21 Fed. [2d], 7th Cir., 829).

III.

Conflicts With Decisions in Other Circuits.

There being, as we have above pointed out, no sufficient evidence of active participation on Egan's part, the verdict was in conflict with the trial court's instructions (R. 1188). The Court of Appeals did not accept the law as declared in these instructions (R. 1188), and supported by decisions in at least six Federal Circuits (Egan Pet. 14, 27-29). It restricted the rule to certain limited situations, to wit (R. 1246):

> **"Where the accused is not in some beneficial, responsible or interested relation to the conspirators and their activities, and where the activities of the conspirators consist of a single or but a few transactions, mere knowledge, acquiescence and indifference will be insufficient, in the absence of some word or deed, to connect him with the conspiracy. Authorities relied upon by Egan, supra."**

No such limitation as the above quoted is to be found in the cases we cite from the other Circuits (Egan Pet. 14).

The opinion below then proceeds, "on the other hand," to state a different rule to apply to this case, omitting the element of participation.

We respectfully submit that in thus limiting the rule, the opinion below conflicts with the other cases cited (Egan Pet. 14); and in its statement of the rule to apply to this case it likewise conflicts. A comparison of the opinion below (R. 1246-7) with the opinion of the Court of Appeals in the Ninth Circuit in Weniger v. United States (47 Fed. [2d] 692, l. c. 693), and the opinion of the Court of Appeals for the Seventh Circuit in Turcott v. United States (21 Fed. [2d] 829), makes the above conflicts clear.

IV.

Construction of Section 12-H.

On the question of the construction of Section 12-H the Brief in opposition says "no arbitrary rule can fix the time when a person becomes a candidate for an office" (Gov. Brief 22). But, even so, in a prosecution for making a contribution to his candidacy, there must be proof that he did, in fact, become a candidate. The fact that a candidacy was contemplated is not enough.

In this case there is no proof in the record that the officeholders in question ever, in fact, became candidates, or even that a candidacy was in contemplation at the time of these payments, and hence the instruction was not only a misconstruction of the statute, but was wholly unsupported by any evidence.

There is no merit in the Government's contention that this matter was not important in Egan's conviction. The insurance agents testified that they made these payments to these officeholders at Spoehrer's direction (R. 406, 587-97). Spoehrer described these payments as part of the insurance practices he engaged in at Boehm's direction (R. 430), and the Government was permitted to introduce in evidence Spoehrer's affidavit, in which he stated: "I verified the fact that Mr. Egan knew about these transactions" (R. 442, 826). It was all thus part of the chain of evidence by which it was sought to convict Egan of conspiracy.

We submit that the Court's charge to the jury (R. 1187) was reversible error.

V.

The Court Should Not Limit the Scope of the Review.

We most earnestly oppose the suggestion in the concluding paragraph of the brief in opposition (Gov. Brief 24), that the review on certiorari be limited to the constitu-

tional questions. The conflicts of decision and the question of statutory construction are also of sufficient importance to warrant the writ.

The other questions which we raised (Egan's Pet. 15) constitute serious error prejudicial to petitioner. Believing that this Court desires the preliminary papers on certiorari to be short and concise, we did not argue these latter points further than to raise them so that, on the writ being granted, we would not be precluded from urging them as additional grounds for reversal (Rule 38, part 2). In view of the Government's suggestion, however, some enlargement becomes necessary.

(a) **Instruction No. 14** (R. 1175; Egan's Assignment of Error No. XLVII, R. 160). Evidence had been received that Egan made contributions to the Republican National Committee in 1936 and in 1938. The latter contribution was pleaded as an overt act in the indictment (R. 22). Egan testified that these contributions were personal and made from his own money (Opinion below, R. 1257, 1116-7, 1099). It was the Government's theory that they were made from funds of the Union Colliery Company (R. 726). The Opinion below ruled that this was a jury question (R. 1246). Instruction No. 14 sought to submit Egan's theory on this issue. The opinion below brushes the point aside with the statement (R. 1257): "The jury was not called upon under the conspiracy count to determine whether Egan personally violated Section 12-H of the Act." We submit, however, that the jury was called upon, under the conspiracy count, to determine whether or not Egan had participated in the conspiracy. It was by these contributions that it was sought to be proved that Egan was a party to, and had committed an overt act in furtherance of, the conspiracy. It was a link in the chain by which he was sought to be connected with the conspiracy.

The requested instruction fairly presented Egan's

theory on the issue raised by this evidence. It was not covered anywhere else in the Court's charge, and its refusal was reversible error.

(b) **Mortimer's testimony re Egan's expense account and Government's Exhibit 115-A** (R. 782-5; Egan's Assignment of Error No. XI, R. 80). This testimony, and this exhibit, in so far as it related to Egan, was hearsay and inadmissible, and the opinion below so rules (R. 1253). We submit it was also prejudicial and should have been held to be reversible error (see Egan's petition for rehearing, pp. 9, 10; R. 1269-1270, where this point is argued). This testimony attributed dishonesty to the defendant. It impeached his credibility as a witness. It contained a sinister suggestion that he was tied up in some way with the expense account padding which constituted such an ugly feature of this case. We submit that its reception, against objection, was reversible error.

(c) **Political practices of North American Light & Power Company** (Egan's Assignment of Error XXI, R. 123, 1001-4). This Assignment of Error, although briefed and argued, was not mentioned in the opinion below—see Egan's Petition for Rehearing (R. 1270). This collateral and irrelevant testimony should have been excluded. It did not tend to prove Egan's motive or intent because he had no part in it [15 C. J. S., Conspiracy, Sec. 92 (e), p. 1145]; being a recital of purely collateral facts with which Egan was in no way connected, it was inadmissible under the rule "res inter alios acta" (22 C. J. S., Crim. Law, Sec. 603, p. 926; 32 C. J. S., Evidence, Sec. 576).

(d) **Spoehrer's Confession** (Egan's Assignment of Error No. X, R. 76, 441-3, 821-7). The accused's mere silence when the confession of an alleged accomplice is read to him and others is insufficient to make it admissible in evidence against him, unless it is further shown that the cir-

cumstances were such as to call for a denial on his part, and to afford him an opportunity to make it (22 C. J. S., p. 1310, notes 54, 55, 56, 57). There was no such showing in this case. See U. S. v. Harris, 45 Fed. (2d), 2d Cir., 690, syl. 5, l. c. 691, pars. 5, 6; Di Carlo v. U. S., 6 Fed. (2d), 2d Cir., 364, syl. 1, l. c. 366; People v. Friedman, 98 N. E. (N. Y. Apps.) 471. Unless some compromising word or act is elicited from the accused on the reading of the confession of an alleged accomplice, the statement is only binding on the party making it, and is not admissible against the accused. No such word or act was elicited from Egan. All the witness (Spoehrer) could say was, "I don't believe Mr. Egan made any comment" (R. 443). A copy of the affidavit was not given to Egan until it was read at the meeting (R. 434, 441). Spoehrer and his attorney held the meeting (R. 429). Spoehrer related what he had done in Washington (R. 429) and his attorney read the affidavit (R. 434). No comment was called for and there is no proof that any opportunity for comment was offered.

In addition to the objections to this affidavit noted in the opinion below (R. 1252) objection was also made on behalf of Egan that "there was no obligation on the defendant to deny it" (R. 821). We submit that the Spoehrer confession was not binding on Egan, and its admission in evidence against him was reversible error.

We submit that if certiorari is granted petitioner should be permitted to urge the errors above reviewed. The Court's jurisdiction on certiorari is the same as on "unrestricted writ of error or appeal" (28 U. S. C. A., Sec. 347). The only limitation on the scope of the review is Rule 38, part 2, limiting same to the questions specifically brought forward by the petition for the writ. We have specifically brought forward each of the above questions in our petition (Egan Petition 3, 7, 15). This is a criminal case in which petitioner's liberty is at stake; we do not

believe that in such a case this Court, if it takes jurisdiction, will refuse to examine errors duly specified and which deprived petitioner of a fair trial. We know of no criminal case in which the review has been so limited.

This petitioner's life has been useful and successful and filled with worthy achievements (R. 1108-9, 1101). His character and reputation are attested by the leading citizens in the community (R. 967, 1011, 1122). These things strengthen the presumption of innocence (Linde v. U. S., 13 Fed. [2d], 8th Cir., 59, syl. 4, l. c. 61, par. 4, 62).

We ask that the writ be granted as prayed.

Respectfully submitted,

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